HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 2650 of 2001 (SS)
(Old No. 40480 of 1999)

Km. Bablesh Dheeman d/o Sri Krishan Lal Dheeman
589, Sainik colony, Roorkee, District Haridwar.... Petitioner

Versus

1. Union of India through the secretary, Ministry of Defence, Government of India, New Delhi
2. The Director General of Medical Services (Army), D.G.M.S. 3 (B), Adjutant General's Branch, Army Head Quarter, D.H.Q. P.O. 'L' Block, New Delhi
3. The Commandant Head Quarters Central Command (Medical) Lucknow
4. The D.D.M.S. Head Quarters U.P. Area (Medical) Bareilly
5. The Commandant /C.O. Military Hospital, Roorkee, District Haridwar .....Respondents

Sri Sharad Sharma, Advocate for the petitioner
Additional Solicitor General for the respondents.

Dated: July 12, 2006

Hon'ble Rajesh Tandon, J.

Heard Sri Sharad Sharma counsel for the petitioner and the Additional Solicitor General for the respondents.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the order dated 2.9.1999 passed by the respondent no. 4.

Briefly stated the petitioner was appointed as Ward Sahayika at Military Hospital, Roorkee vide order dated 11.12.1996 and she joined her duty on 24.12.1996. The petitioner was kept under probation for two years. After the

expiry of two year, the probation period of the petitioner was further extended for another one year. However, before completion of that period, petitioner's service was terminated vide order-dated 2.9.1999.

The petitioner has alleged that the impugned termination order is unjust and unfair in view of the facts that the same does not come on the test of the conditions of appointment letter. No notice has been given to her and no reason for termination has been assigned.

At the time of filing of writ petition, the Court has passed the following interim order on 21.9.1999:

"Matter requires scrutiny. Let a counter affidavit be filed within 6 weeks and list thereafter.

In the meantime the operation of the impugned order dated 2.9.99 shall remain stayed."

The respondents have filed counter affidavit and denied the allegations made in the petition. The respondents have submitted that since the conduct and performance of the petitioner during the probationary period was found highly unsatisfactory including of number of warning letters based on the complaints, therefore, her case for confirmation was not recommended to the Board of Officers vide personal sheet dated 4.1.1999. The respondents also filed copies of show cause letters and warning letters along with the counter affidavit. It has also been submitted by the respondents that a request was made to Deputy Director of Medical Services Headquarters U.P. Area Bareilly to extend probation period of the petitioner by one year vide MH Roorkee leter No. 20293/Coy/civ/98 dated 12.10.98 to give fair chance to the petitioner to improve her conduct and performance, which was granted by the said

authority vide letter dated 2.1.1999. The appointment was temporary and it can be terminated during the probation period.

Although the respondents have filed copies of letters asking the petitioner to show cause but what explanation offered by her in reply to the show cause notices has not been filed at all by the respondents. According to the case of the petitioner, all such documents are with the respondents, such conduct of the respondents' shows that they were concealing the real facts and are making ex parte allegations against the petitioner. The petitioner alleged mala fide against the respondents and has submitted that the respondents' authorities were prejudiced against him and they concocted and fabricated a false case against him and without any notice or without assigning any reason terminated the service of the petitioner, when she completed more than two years nine months' service.

The Apex Court in the case Dipti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences (1999) 3 SCC 60 in a similar case has held as under:

"If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the

allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.

22. *In the light of the above principles laid down in R.S. Gupta case[2] we do not think anything more is to be added. Point 1 is decided accordingly.*

Point 2

23. *In the present case before us, the order of termination dated 30-4-1997 is not a simple order of termination but is a lengthy order which we have extracted above. It not only says that performance during probation is not satisfactory but also refers to a letter dated 30-4-1996 by which the period of probation was extended by six months from 2-5-1996, and to letters dated 17-10-1996 and 31-10-1996. It concludes by saying that the appellant's "conduct, performance, ability and capacity during the whole period of probation" was not satisfactory and that he was considered "unsuitable" for the post for which he was appointed.*

24. *The contention for the appellant is that if the appellant is to seek employment elsewhere, any new employer will ask the appellant to provide the copies of the letters dated 30-4-1996, 17-10-1996 and 31-10-1996 referred to in the impugned order and that if the said letters contain findings which were arrived at without a full-fledged departmental enquiry, those findings will amount to stigma and will come in the way of his career.*

25. *In the matter of "stigma", this Court has held that the effect which an order of termination may have on a person's future prospects of employment is a matter of relevant consideration. In the seven-Judge Bench decision in Samsher Singh v. State of Panjab*[5] *Ray, C.J. observed that if a simple order of termination was passed, that would enable the officer to "make good in other walks of life without a stigma". It was also stated in Bishan Lal Gupta v. State of Haryana*[9] *that if the order contained a stigma, the termination would be bad for "the individual concerned must suffer a substantial loss of reputation which may affect his future prospects".*

Further in the case of Chandra Prakash Shahi vs. State of U.P. others (2000) 5 SCC 152 similar controversy has been adjudicated by the Apex Court and has held that if there are allegations of misconduct for which preliminary enquiry is conducted behind the back to ascertain the truth and then termination is brought about, such termination, having regard to other circumstandces of a case , has to be taken as founded on misconduct and therefore, to be treated as punitive. As regard to termination of a probationer, it has to be seen whether enquiry was for the purpose of determining his suitability for retention in service/ confirmation, or for the purpose of finding out the truth in simpliciter while the latter would be case of punitive termination founded on misconduct. The Apex Court has observed as under:

"The whole case-law is thus based on the peculiar facts of each individual case and it is wrong to say that decisions have been swinging like a pendulum; right, the order is valid; left, the order is punitive. It was urged before this Court, more than

once including in Ram Chandra Trivedi case21 that there was a conflict of decisions on the question of an order being a simple termination order or a punitive order, but every time the Court rejected the contention and held that the apparent conflict was on account of different facts of different cases requiring the principles already laid down by this Court in various decisions to be applied to a different situation. But the concept of "motive" and "foundation" was always kept in view.

28. *The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".*

29. *"Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order*

terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry.

While dealing with the termination orders under Rule 5 (1) of the Central Civil Services (Temporary Service) Rules 1965, the Apex Court in the case of State of Orissa Vs. Dr. Binapani Dei and others AIR 1967 SC 1269 has observed that the orders which involve civil consequences have to be passed consistently with the rule of natural justice. The observations of the Apex Court are quoted below:

> *"An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fair play. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is, however, under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority, which is sought to be relied upon to his*

prejudice. For that purpose the person against whom an enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed, is entitled to a hearing, applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed; it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case".

A perusal of the counter affidavit shows that the petitioner was terminated from service on account of misbehaviour and disobedience. When the order of termination is based on certain allegations, even if a person holding temporary employment, the principles of natural justice and equity demand giving of an opportunity to refute such allegations. Unless the truth is ascertained after giving opportunity to the petitioner, there cannot be any order of termination and that too under Rule 5 (1) of the Central Civil Services (Temporary Service) Rules 1965.

The respondents have annexed the copies of letters dated 13.11.1998, 25.11.1998 and 31.5.1999 issued to the petitioner asking her to show cause. Warning was also issued to her vide letter dated 10.5.1999. However, the reply and explanation of the petitioner against the aforesaid letters has not been filed. Thus the action taken by the respondents against the petitioner is ex parte without giving opportunity of proper defence to her.

The facts of the present case are squarely covered by the case of Dipti Prakash Banerjee (Supra). In the present case allegations of misconduct were levelled against the delinquent employee behind the back of her and without regular departmental enquiry, simple order of termination was passed which is to be treated as 'founded' on the allegations and will be bad.

If some allegations of misbehaviour and insubordination have been made against the petitioner, it was incumbent upon the respondents to give an opportunity to the petitioner before issuing the order of termination. In that view of the matter, the order of termination cannot be sustained. However, it will be open for the respondents to initiate fresh disciplinary proceedings against the petitioner after giving opportunity of proper defence to her, and pass the order in accordance with law. There had been an interim order dated 21.9.1999, staying the operation of the impugned order, pursuant to which the petitioner is continuing in service.

In that view of the matter, a writ of certiorari is issued quashing the order-dated 2.9.1999 passed by the respondent no. 4. The petitioner shall continue in service as if her service has not been terminated and she shall be entitled to all service benefits as admissible in law.

Accordingly, writ petition is allowed. No order as to costs.

Dated: July 12, 2002 **Rajesh Tandon, J.**

*Dhyani